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In the Supreme Court of the United States

OCTOBER TERM, 1983

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**PACEMAKER DIAGNOSTIC CLINIC OF AMERICA, INC.,
PETITIONER**

v.

INSTROMEDIX, INC., ET AL.

—
**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the federal magistrate's trial and entry of judgment in this action with consent of the parties pursuant to 28 U.S.C. 636(c) violates Article III of the Constitution.

1. Petitioner began this patent infringement action against respondent Instromedix, Inc. on June 5, 1979 (Pet. App. 5a). With the consent of the parties, United States Magistrate George E. Juba conducted a bench trial in November, 1981. The magistrate found for respondent, holding that although petitioner's patent was valid, respondent had not infringed it (*ibid.*).

On appeal, neither party challenged the constitutionality of the trial before the magistrate (Pet. App. 5a). The panel sua sponte requested the parties to address that issue at oral argument, and thereafter directed them to file supplemental

briefs addressing the issue. It also requested the United States to file a brief *amicus curiae*.

The panel held that Section 636(c) violated Article III of the Constitution and vacated the judgment entered by the magistrate (Pet. App. 35a-50a). Relying on its reading of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the panel determined that a trial before a magistrate, even with the parties' consent, violated the separation of powers principles inherent in Article III. It reasoned that the litigants' consent did not remove these concerns, since the threat of excessive delegation of Article III power to non-Article III officials affected broader interests (Pet. App. 43a-47a). It also concluded that magistrates could not be considered "adjuncts" of the district court, because they were empowered to enter final judgments (*id.* at 42a).

The court of appeals then granted the government's motion to intervene after judgment in order to file a petition for rehearing, and voted to rehear the case en banc (Pet. App. 5a).

The limited en banc court¹ reversed (Pet. App. 4a-34a), three judges dissenting. It held that the consensual reference in Section 636(c) was not an improper delegation of Article III judicial power (Pet. App. 12a-18a). The court also held that the extensive administrative control over the management, composition, and operation of the reference scheme effectively protected the judiciary from encroachment by the executive and legislative branches (*id.* at 13a-15a). In particular, the en banc court noted the safeguards implicit in the district court's power to cancel a reference at any time

¹A limited en banc court of eleven judges is authorized by Ninth Circuit Rule 25.

under 28 U.S.C. 636(c)(6), and the court's retention of the contempt power under Section 636(e) (Pet. App. 15a).

We are filing simultaneously with this brief a brief in opposition to the petition in *Foreman v. Collins*, No. 83-1616, which raised the same constitutional challenge to the consensual reference provisions in 28 U.S.C. 636(c). For the reasons stated in our brief in opposition in *Collins*, we believe that review is unwarranted here.²

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1984

²We have furnished copies of our brief in opposition in *Collins* to counsel for the other parties in this case.